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No. 99-1863

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

ALLEN BREAUX and JOE AMBROGIO
Petitioners,

v.

CITY OF GARLAND, TERRY HENSLEY, and RON HOLIFIELD
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. ("NAPO") and its affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, respectfully submit this brief in support of the Petitioners for a writ of certiorari in this case.[1]

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. Specifically, NAPO is a coalition of police associations and unions that serves to advance the interests and rights of law enforcement officers through legal advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 220,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel) and 11,000 retired officers. The Petitioners are currently members of, and at the time of the constitutional violations giving rise to this lawsuit, were officers of the Garland Police Officers Association (GPOA), which is a member of NAPO (through its membership in a statewide umbrella association).

In addition to the Petitioners, law enforcement officers (and their labor organizations) throughout the Fifth Circuit are directly implicated by the U.S. Court of Appeals' extremely restrictive view on the levels of retaliatory actions by public

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amici curiae* and its members, made a monetary contribution to the preparation or submission of the brief. Both the Petitioners and the Respondents have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court, pursuant to Supreme Court Rule 37.3(a)

employers which constitute a "chilling effect" on the exercise of their First Amendment rights (as applied to them through incorporation under the Fourteenth Amendment). Officers and their labor organizations, not only in the Fifth Circuit but elsewhere, have a significant interest in resolving the confusing state of the law concerning recovery for damages when their fundamental rights under the First Amendment are violated through serious retaliatory actions. Hence, it is imperative that those rights be protected, not allowed to go unaddressed and unremedied, as they were in this case and as happens in other cases throughout the nation.

SUMMARY STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in the petition for writ of certiorari. What follows is a shorter narrative of the facts and proceedings.

This case involves the First Amendment retaliation claims of two police officers, Allen Breaux and Joe Ambrogio, the Petitioners, against the City of Garland, Texas, its former Police Chief, Terry Hensley, and its former City Manager, Ron Holifield, the Respondents. The two officers alleged that these two officials violated 42 U.S.C. § 1983 by seriously infringing their constitutional rights to free speech and free association. Specifically, the officers alleged retaliation against them for making private and public allegations of corruption in the Garland Police Department, which included expressions of concern about political investigations of city council members.

While not fired from their positions, the officers suffered through a campaign of retaliatory harassment by their supervisors, who were involved in the allegations of corruption and were therefore motivated by a desire to punish the officers for their speech on this matter of public concern. The following adverse employment actions were taken against the officers: 1)

"trumped-up" Internal Affairs charges, 2) repeated interrogations of the officers during a clearly biased investigation of the charges, 3) suspension with pay by Hensley, the official whom the Petitioners accused of abuse of power and retaliation, 4) defamatory public reprimands posted on the police department's "Wall of Shame" and disseminated to the media, 5) a 3½ day mental stability exam which included psychological and polygraph testing, 6) gag orders that continued even after the charges against the officers were resolved, effectively disabling them from defending against attacks on their reputations, and 7) threats to terminate the officers if the officers did not sign false confessions in the form of apology letters drafted by Hensley, which they refused to do.[2]

The jury found the individual Defendants liable; the court had previously granted a summary judgment for the City, on the ground that Hensley and Holifield did not have "final policy-making authority" for the City with respect to "police officer employment decisions." After a seven-day trial, the jury found Hensley and Holifield individually liable, awarding to the plaintiffs a total of $27.7 million in actual and punitive damages and costs, which was reduced by the court to just over $8 million, with the Plaintiffs accepting this remittitur plus attorneys' fees.

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[2]It appears that the retaliation against the officers began after Holifield expressed concern with tactics of the officers' union, the Garland Police Officers Association (GPOA); he allegedly threatened to "destroy" the GPOA if it acted "politically" with respect to these allegations (concerning illegal political investigations being run by Hensley) and to results of a management survey of GPOA members. Breaux, infra, 205 F.3d at 153. The threats against the GPOA are not at issue here, but this is relevant because both Petitioners were officers in GPOA at the time.

Both sides appealed the verdict to the Fifth Circuit Court of Appeals. Breaux et al. v. City of Garland et al., 205 F.3d 150 (5th Cir. 2000). The Fifth Circuit recognized the factual basis for the verdict against the individual defendants. The court stated in its opinion, "The jury was persuaded that [the officers] became objectives of a vendetta by Chief Hensley and City Manger Holifield, once they blew the whistle on politically-motivated investigations of Garland City Council members by the City's top employees." 205 F.3d at 156.

Notwithstanding the corroborating evidence, the Fifth Circuit panel ruled against both officers "because the Plaintiffs failed to prove that official retaliation against them was sufficiently serious to constitute a constitutional injury." The Court found that all the reprisals and retaliatory actions against the officers did not constitute, either individually or collectively, the adverse employment actions necessary for a First Amendment retaliation claim. It stated: "Even though they persuaded the jury, ... and they truthfully spoke out to reveal political investigations of public officials, the exercise of First Amendment rights is not enough" and that the "actions taken by Defendants Hensley and Holifield did not give rise to 1983 liability." It also rendered a "take-nothing judgment against the Plaintiffs on these claims." 205 F.3d 164, 165.

This petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

This Court should grant this petition and accept review for two reasons: First, protection against and remedies for First Amendment violations are very important, particularly to the law enforcement profession and citizens who benefit from officers who report governmental malfeasance, corruption, or other matters of public concern. Second, this Court's review would resolve the inconsistencies and conflicts between the

Fifth Circuit and most other federal circuits concerning the level of retaliation necessary for actionable constitutional injury, and thus would provide clear directives to lower courts and government agencies.

State and local law enforcement officers and other public employees should be able to engage in what would be clearly protected exercises of free speech, without suffering all types of reprisals and retaliatory adverse actions (short of dismissal, suspension without pay, or demotion). The Fifth Circuit's holding in this case means that such retaliatory actions, taken all together, are not actionable under 42 U.S.C. § 1983 within Texas, Louisiana, and Mississippi.

There is a substantial conflict of decisions between the Fifth Circuit, on the one hand, and the Seventh, Second, Fourth, First and District of Columbia Circuits, on the other hand, as to whether various types of retaliatory adverse employment actions— other than the loss of a job, suspension (without pay) or demotion—constitute retaliatory actions which chill free speech and are thus actionable for a violation of a public employee's constitutional rights.

Law enforcement officers and other public employees throughout the United States should be guaranteed equal treatment under the law. Seven retaliatory actions collectively taken against an officer should not be held to be constitutionally permissible in one federal circuit, while at the same time, each of the retaliatory actions considered separately would likely be condemned as a constitutional violation in several other federal circuits. The availability of a remedy under § 1983 for constitutional violations should not depend on the federal circuit in which an officer performs his duty to protect and serve. More uniformity throughout the nation is needed, in view of the preeminence of the First Amendment's protections.

Unless this decision is reviewed by this Court, in the Fifth Circuit and possibly other federal circuits in the future, the First Amendment will provide a constitutional right without a remedy for public employees. This is because government agencies in the Fifth Circuit now have a "green light" to impose as many types of serious adverse employment actions on their employees as possible—short of actual dismissal, suspension, or demotion—in order to coerce and pressure employees who have spoken out on matters of public concern, even to the point of forcing their resignations. Law enforcement officers will be especially susceptible to such retaliation, because of the hierarchy within their departments and the availability of disciplinary action for the most minor infractions.[3] In Marbury v. Madison, 5 U.S. 137, 163 (Cranch) (1803), this Court explained: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

ARGUMENT

I. The Fifth Circuit's holding of what constitutes actionable adverse employment action is unrealistically restricted and blindfully ignores the seriousness and increasing frequency of subtle and camouflaged retaliation against public safety officers for exercising their First Amendment rights.

The late 1990's demonstrated a continuing increase in

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[3]The plight of many of America's law enforcement professionals is summed up by New Hanover County, NC, Sheriff Joseph McQueen, as follows: "They serve at the whim of the Sheriff." Benson v. McQueen, (E.D.N.C. 7:98-CV-164-DEN), Deposition Testimony, at 443. This prevalent attitude creates an environment that leads to the types of continuing retaliation to which Officers Breaux and Ambrogio were subjected.

across-the-board retaliation against law enforcement officers and also other public employees who communicate about malfeasance or corruption within their agencies or other matters of important public concern. The reported appellate decisions in law enforcement free speech cases in recent years demonstrate the gravity and significance of First Amendment protections[4] for these officers.[5]

In order for law enforcement officers to successfully perform their difficult and potentially deadly duties to serve and protect, they need to be confident that they are free to speak out and communicate about problems within their departments and agencies, particularly when the concerns involve retaliation, malfeasance, and corruption, including politically-inspired

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[4]For example, Sexton v. Martin, 210 F.3d 905, 911 (8th Cir. 2000), "Freedom of speech is among the most precious of our constitutional rights." National v. Town of Dedham, 43 F.3d 731, 736 (1st Cir. 1995). "Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." NAACP v. Claiborne, 458 U.S. 886, 913 (1982). "The First Amendment demands a tolerance of verbal tumult, discord, and even offensive utterance." Waters v. Churchill, 511 U.S. 661, 672 (1994).

[5]Scores of cases demonstrate how law enforcement officers, are often subject to egregious and protracted retaliation because of simple expression. See, e.g., Scott v. County, 180 F.3d 913 (8th Cir. 1999); Brady v. Ford, 145 F.3d 691 (5th Cir. 1998); Brawner v. City, 855 F.2d 187, 191-92 (5th Cir. 1988)("the disclosure of misbehavior by public officials is a matter of public interest and therefore deserves the constitutional protection, especially when it concerns the operation of a police department."); Worrell v. Bedsole, 110 F.3d 62 (4th Cir. 1997)(a lieutenant pressed the sheriff with repeated complaints about personnel shortages and equipment breakdown; such speech was held protected).

investigations of public officials, clearly constitutionally protected as were the statements in this case.

A review of recent court decisions, infra, demonstrate widespread patterns of retaliation against whistleblowing law enforcement officers, as well as other public employees. Many agency management officials who engage in retaliation against law enforcement officers and other public employees for protected free speech activities act more blatantly, than did the officials in this case, by imposing the more traditional and severe forms of retaliation, namely termination, suspension (without pay), and demotion. These public officials proceed recklessly and clearly disregard the First Amendment; this subjects them occasionally to § 1983 liability and damages, as confirmed by both state and federal appellate decisions upholding judgments against such officials.

Through specific, real-world experiences, provided by law enforcement officers or their attorneys when requesting guidance from the NAPO's National Law Enforcement Officers' Rights Center concerning retaliatory acts taken against them, *amicus curiae* NAPO has learned that the more sophisticated and less brutal retaliation has become more frequently committed like other forms of contemporary discrimination in the workplace: It is typically done in camouflaged and subtle means of retaliation designed to intimidate officers and chill their constitutional free speech expression rights, often attempting to coerce "voluntary resignations".

Sophisticated retaliators communicate in many ways, less often through direct means which can be more readily revealed, captured (by documentation or otherwise), addressed by senior management, and remedied in federal litigation. Contemporary retaliation often forms in smoke-filled back rooms in law enforcement departments throughout the nation.

Although adverse employment action in its most extreme form, i.e. through loss of a job and pay, arguably has a more immediate economic impact upon the law enforcement officer, arguably less severe forms of retaliation can similarly have serious ramifications for the officer and his or her family. The substantial adverse effects of less severe retaliation include demoralization, intimidation, and serious physical and emotional distress, among others, often resulting in less effective on-the-job performance.

These consequences are clear, for example, by just focusing on two of the seven instances of retaliatory actions that occurred in this case. The "trumped up" internal affairs charges against the Petitioners and the resulting investigation were a form of severe retaliation. This is because such charges and the following investigation cause law enforcement officers to incur substantial legal expense and suffer personal humiliation in defending themselves against such charges. Trumped up and unfounded charges often have a deterrent and chilling effect upon other officers, as well as other public employees. Furthermore, few events are more stressful and demoralizing to a law enforcement officer than to be subjected to unnecessary and purely punitive internal affairs investigations resulting from trumped up charges, as a consequence of exercising their First Amendment rights.

The case before the Court presents an overwhelming pattern and practice of retaliation against the Petitioners, as demonstrated by the seven instances of adverse action taken against them. In essence, the totality of the course of retaliatory action taken against Officers Breaux and Ambrogio is among the most vile course of retaliatory conduct set forth in any published decision, short of the additional consequence of termination.

II. Just one retaliatory action can constitute a chilling effect to prevent or punish for the exercise of free speech rights and thus give rise to constitutionally actionable injuries, as held by other federal circuit courts of appeals. Thus, seven instances of serious retaliatory action in this case should unquestionably constitute an actionable injury.

A

The petition for writ of certiorari, at 22-27, outlines the four different approaches to what constitutes actionable adverse action under § 1983. Therefore, for the most part, that analysis is not repeated herein. The more responsible and realistic approaches in determining adverse action, to remain faithful to First Amendment's protection of free speech, are the cases which recognize any definitive discipline and those which recognize the "objective chilling" standard.

This Court's observation in Rutan v. Republican Party, 497 U.S. 62, 76 n.8 (1990) sets a low threshold. The First Amendment protects public employees from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee...when intended to punish her for exercising her free speech rights." That observation has created some confusion among the federal circuit courts as they have attempted to develop methodological tests to determine on a case-by-case basis the sufficiency of actionable adverse employment action. Rutan and other cases cited in the instant petition for writ of certiorari manifest that this Court has recognized that the appropriate minimum threshold necessary for actionable adverse actions is in fact varied and encompasses a broad level of different types of retaliation, contrary to the unrealistically narrow and list-driven approach of the Fifth Circuit in this case.

Traditional First Amendment doctrine emphasizes the

adverse effects, the negative impacts and consequences, commonly known as the "chilling effect" of governmental punishment. See Gooding v. Wilson, 405 U.S. 518, 521 (1972). Many types of retaliatory adverse action, in addition to actual termination, suspension without pay or demotion, can sufficiently cause this chilling effect on law enforcement officers and other public employees exercising their lawful free-speech rights. "[R]etaliation by a government employer against an individual who exercises his First Amendment rights constitutes a First Amendment violation." Perry v. McGinnis, 209 F.3d 597, 604 (6th Cir. 2000).

Many law enforcement officers are perceptive because of their training and the usefulness of that trait in investigating crime. This makes them particularly well positioned to discover internal corruption or other wrongdoing. At the same time, it also enables them to recognize when the "whip is being cracked" by management and a chilling message is being sent throughout the department. When retaliation is collectively directed against officers in seven different ways, as occurred in this case, the chilling effect is clear, definitive, and strikes at the heart of the First Amendment's protections. Without such protections, law enforcement officers will be discouraged from uncovering and ultimately reporting matters of great importance to the public.

This Court's pronouncement over thirty years ago should be reaffirmed: Law enforcement officers are not "relegated to a "watered down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). Unfortunately, the Fifth Circuit's decision in this case has relegated law enforcement officers throughout the Fifth Circuit to "a watered down version of constitutional rights", inconsistent with this Court's teachings in past decisions.

B

Because public sector workplaces often become a battleground for disgruntled supervisors to carry out political and other illegitimate missions, courts have recognized a multitude of conduct as being constitutionally actionable under the First Amendment. Scores of law enforcement expression cases demonstrate the chilling effects associated with various forms of management retaliation.

For example, in Rakovich v. Wade, 819 F.2d 1393 (7th Cir. 1987), the court held that even an investigation of a police officer as a result of his expression, as occurred in this case, is actionable under the First Amendment. Other cases show how virtually all types of changes in terms and conditions of employment trigger application of the Rutan doctrine. See Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989)(en banc)(imposition of burden on employee that makes job inferior invokes application of Rutan).

In Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999), the Fourth Circuit explained how the First Amendment prohibits governmental conduct which has a chilling effect upon the speaking employee. There, the adverse action at issue was the denial of Sgt. Edwards' efforts to teach an off-duty course of instruction. The off-duty course of instruction involved North Carolina's new concealed-carry-handgun law, which was controversial and undesirable according to the opinions and political preferences of the Goldsboro Chief of Police. In Edwards, the officer was confronted with a threat of termination if he taught the concealed handgun course. The court observed that the threat of termination "was intended to chill his rights to engage..." in protected expression. Therefore, the Court concluded that "the threat is actionable." 178 F.3d at 248. The Fourth Circuit's approach in Edwards was consistent with this Court's decisions, and its decision was predicated on

the deterrent effects of government retaliation.

In Smith v. Fruin, 28 F.3d 646, 649 n.3 (7th Cir. 1994), the Seventh Circuit explained: "[E]ven minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures." In Smith, the court observed that the assignment of a police officer to a surveillance assignment could constitute an actionable adverse action.

There are other federal circuit decisions providing a remedy for various other types of harassment and retaliation. In Donahue v. Board of Fire Commissioners, 834 F.2d 54, 59 (2nd Cir. 1987), a pattern of harassment, including the retention of an employee's personal diary and disclosure of its contents, could be actionable. In Yoggerst v. Stewart, 623 F.2d 35, 39 (7th Cir. 1980), a verbal reprimand and notation in a personnel file was sufficient to support an employee's claim. In Crady v. Liberty, 993 F.2d 132, 135 (7th Cir. 1993), the court observed that a demotion, a less distinguished title, a loss of benefits, significantly diminished responsibilities, or other indices are relevant to establishing an actionable claim.

Other federal circuit courts have provided a remedy for a single retaliatory act. In Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994), the District of Columbia Circuit held that requiring an applicant for a promotion to resubmit a lengthy application, while allowing co-workers to be reassessed on original materials, is a sufficient adverse action. In Marohnic v. Walker, 800 F.2d 613 (6th Cir. 1986), the court held that failing to provide an unqualified letter of recommendation can constitute an adverse action if the employer acted in retaliation for protected expression. In Dahm v. Flynn, 60 F.3d 253 (7th Cir. 1994), the employee-plaintiff suffered a change in job duties following testimony before a legislative committee regarding low morale in the state agency. The court concluded

that a "qualitative rather than a quantitative change" can support a claim of retaliation.

Following Rutan, a number of cases have recognized the "petty harassment doctrine" whereby the most isolated and petty harassment is constitutionally actionable under the First Amendment because of the extreme importance of First Amendment rights in our nation's jurisprudence. See Wallace v. Benware, 67 F.3d 655, 663 (7th Cir. 1995)("Campaign of petty harassment in response to views expressed during a political campaign is actionable under Section 1983 as a violation of the First Amendment"); Tao v. Freeh, supra,(requiring an additional 27 hours at work before the employee involved was allowed to qualify for a promotion was adverse action); Pieczynski v. Duffy, 875 F.2d 1331 (7th Cir. 1989)(petty harassment, consisting of taking away long distance phone service, denying requests for vacation time, not allowing employee to change her lunch hour, and not inviting her to a superior's birthday party, is actionable under the First Amendment); Wagner v. Texas, 939 F. Supp. 1297, 1314 (S.D. Tex. 1996)(a reassignment within the workplace may serve as a basis for a First Amendment claim).

All of these holdings are in stark contrast to the unduly restrictive views of the Fifth Circuit in this case. Ironically, none of these foregoing cases presents the sort of egregious and ongoing retaliation that officers Breaux and Ambrogio were subjected to. It was the totality of retaliation, in violation of the First Amendment, which served as the basis for the jury's verdict in favor of the officers and its imposition of substantial damages against the officials, as a remedy for all of the injuries suffered by the officers for these serious violations.

CONCLUSION

This case reminds one of the observations of the late

Senator Sam Ervin: "First Amendment freedoms are often grossly abused." SAM ERVIN, PRESERVING THE CONSTITUTION, 210 (1984). In order to remedy the gross abuse of First Amendment free speech activities, this Court should accept review of this case to resolve the substantial federal circuit court conflict. This would provide guidance for the state and federal courts and would ultimately create some certainty for the law enforcement profession and the public.

In addition, the questions presented in the petition for a writ of certiorari represent grave issues of fundamental importance for the hundreds of thousands of law enforcement professionals, millions of other public employees, and their families. Law enforcement officers and other public employees throughout the nation are entitled to constitutional protection from various types of harassing and retaliatory adverse employment actions, which chill and deter the exercise of free speech. At the very least, if these public employees are not entitled to such protection, they should at least know that they will not be protected and have no remedy for such violations.

Amicus curiae respectfully requests that the petition be granted. The interests of justice will be served by granting the writ and grappling with the difficult issues presented.

Respectfully submitted on this 21st day of June, 2000,

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